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**JUN 30 2017**

**WASHINGTON STATE  
SUPREME COURT**

No. 94452-1

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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MAYTOWN SAND AND GRAVEL, LLC and  
PORT OF TACOMA,

Plaintiffs/Respondents,

v.

THURSTON COUNTY,

Defendant/Appellant

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**AMICUS CURIAE MEMORANDUM OF WASHINGTON  
STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION  
FOR REVIEW**

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 **ORIGINAL**

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

Washington State Association of Counties ("WSAC") is a non-profit organization that serves all of Washington's 39 counties, and has done so since 1906, shortly after Washington adopted its constitution. Its members include elected county commissioners, county council members, county councilors, and county executives. WSAC offers specialized expertise and assistance to its members and their staff on a wide variety of programs and policy areas.

## **II. STATEMENT OF THE CASE**

WSAC relies on petitioner's version of the case.

## **III. INTRODUCTION**

As a representative of Washington counties, WSAC has a significant interest in both ensuring counties have the ability to carry out their duties, and in minimizing unnecessary and wasteful litigation. The decision in this case threatens those interests, as it will subject counties to increased litigation; strip land use decisions of finality; and place the power to make permitting and land use decisions in the hands of the judiciary rather than local officials.

For these reasons, WSAC supports the Petition for Review filed by Thurston County, which seeks review of the Court of Appeals, Division II, (hereinafter "The Appellate Court") ruling in *Maytown Sand & Gravel LLC v. Thurston County*, 198 Wn. App. 560 (2017) (hereinafter the "Opinion").

#### IV. ARGUMENT IN SUPPORT OF GRANTING REVIEW

**1. The Decision Below Ignores The Question Of Whether Petitioners Must Exhaust Their Administrative Remedies Before Challenging Permitting Decisions In Superior Court.**

The Land Use Petition Act (hereinafter “LUPA”) was enacted to ensure consistent, predictable, and timely judicial review by creating an exclusive and uniform process by which property owners may challenge land use decisions. RCW 36.70C.010. It is in the interests of WSAC’s member counties that LUPA remain in full force, as its administrative remedies promote finality, predictability, and efficiency. However, through its ruling in *Maytown*, the Appellate Court has significantly weakened LUPA by allowing property owners to bypass its administrative processes.

Critically, the Opinion failed to adequately address the hearing examiner’s ruling regarding SUP amendments (hereinafter “Amendment Ruling”), and whether the Respondents’ (hereinafter “Maytown”) failure to appeal that ruling barred its claim under LUPA. Thus, two questions remain unanswered. First, by choosing not to appeal the Amendment Ruling, did Maytown fail to exhaust its administrative remedies? Second, presuming Maytown failed to exhaust its administrative remedies under LUPA, did its tortious interference claim fall within LUPA’s monetary damages exception, thereby allowing it to bypass the administrative process? By not adequately considering these questions, the

Appellate Court contradicted existing precedent, and issued a flawed ruling which may negatively impact counties statewide.

- a. **Because Maytown implicitly challenged the hearing examiner's rulings in superior court without first exhausting its administrative remedies, the claim was barred.**

On appeal, Thurston County argued that Maytown failed to exhaust its administrative remedies regarding the Amendment Ruling. However, noticeably absent from the Opinion is any meaningful analysis of this issue. Instead, the Appellate Court stated that the Amendment Ruling was not a land use decision, and because Maytown's claim was not a challenge to a land use decision,<sup>1</sup> it was not barred by LUPA. *Maytown*, 198 Wn.App. at 580. This ruling plainly misstates the law. While it is true that the Amendment Ruling was not a land use decision, it is precisely because there was no final land use decision that Maytown was barred from raising the issue at trial.

To begin, both LUPA and existing case law clearly require a petitioner to exhaust administrative remedies before they can seek a ruling at trial. *See* RCW 36.70C.060(2)(d). In *Durland*, the plaintiff asked the trial court to declare a neighbor's building permit void. *Durland v. San Juan County*, 182 Wn.2d 55, 67, 340 P.3d 191 (2014). This Court held that the plaintiff had not obtained a final land

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<sup>1</sup> To qualify as a land use decision, a ruling must be made by a local officer with the highest authority, RCW 36.70C.020(2). Because the Thurston County Board of Commissioners is the highest authority in Thurston County, the Amendment Ruling made by the hearing examiner did not qualify as a land use decision.

use decision through administrative procedures, therefore, the trial court lacked jurisdiction to hear the permit challenge. *Id.* at 66. This Court then went on to state that “the exhaustion requirement is essential because it furthers LUPA’s policy of efficient and timely review,” and “even illegal decisions must be challenged in a timely, appropriate manner.” *Id.* at 68 (noting that “the doctrine of exhaustion (1) insure[s] against premature interruption of the administrative process; (2) allow[s] the agency to develop the necessary factual background on which to base a decision; (3) allow[s] exercise of agency expertise in its area; (4) provide[s] a more efficient process; and (5) protect[s] the administrative agency’s autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts”).

Just as in *Durland*, here Maytown sought to obtain a land use decision from a trial court in lieu of pursuing the exclusive administrative remedies under LUPA. At issue in the Amendment Ruling was whether amendments requested by Maytown were major or minor.<sup>2</sup> Both Thurston County and the hearing examiner ruled that they were major, meaning they required new hearings prior to their approval, and that mining would necessarily be delayed until their completion. If these rulings stood, and the requested amendments were deemed major, then Thurston County was justified in delaying Maytown’s mining activities, and

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<sup>2</sup> Conditions on land use permits fall within the scope of land use decisions, and are subject to LUPA requirements. *See James v. Kitsap County*, 154 Wn.2d 574, 583-86, 115 P.3d 286 (2005).

Maytown's tortious interference claim would fail. Therefore, by raising its tortious interference claim, Maytown was implicitly asking the trial court to make a land use decision holding that the amendments were, in fact, minor, otherwise there could be no damages. As a practical matter, Maytown's tortious interference claim was no different than asking the trial court to directly rule on a permitting issue. Therefore, the facts of this case are consistent with, and should be decided in the same manner as *Durland*.

In light of these facts, the Appellate Court did not just issue a flawed decision, it failed to address the key issue altogether. Its ruling runs directly counter to this Court's holding in *Durland*, and opens the door for property owners to bring land use permit challenges directly to superior courts rather than through proper administrative channels.

- b. The exception for monetary damages allows for petitioners to bypass LUPA's procedures, but it does not excuse a failure to exhaust administrative remedies. Because Maytown chose not to pursue administrative remedies, its tortious interference claim is barred regardless of whether it sought monetary relief.**

If Maytown failed to exhaust its administrative remedies, the next question is whether the monetary damages exception would apply to save the tortious interference claim. That exception allows for petitioners to bypass LUPA procedures,<sup>3</sup> standing requirements and deadlines when their claim is for monetary

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<sup>3</sup> LUPA procedures are listed in RCW 36.70C.040.

damages rather than a challenge to a land use decision. RCW 36.70C.030. However, the Appellate Court's analysis of the monetary damages exception was flawed from start to finish; focusing on the wrong issues,<sup>4</sup> and failing to distinguish between LUPA's procedural requirements such as deadlines and the broader requirement to exhaust administrative remedies.

Both Maytown's answer and the Opinion cited to *Lakey*, but their analysis glossed over a critical distinction.<sup>5</sup> *Maytown*, 198 Wn.App. at 579-80 (citing *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013)). Here, Maytown's tortious interference claim implicitly required the superior court to overturn the Amendment Ruling. The claim was, at least in part, a land use question, and the very same issue Maytown had previously challenged in administrative proceedings, only to abandon the LUPA process after receiving an adverse decision. In *Lakey*, although plaintiffs initially challenged the approval of a permit, at trial they only brought a claim for inverse condemnation. *Lakey*, 176 Wn.2d at 927. Unlike the present case, *Lakey*'s inverse condemnation claim did not require the trial court to rule on a permitting question, rather, it only asked the court to determine whether an electrical substation had impacted the value of their

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<sup>4</sup> The Appellate Court focused its analysis on the hearing examiners ruling on the five year review issue. It is unclear why, as this was not relevant to the discussion.

<sup>5</sup> *Libera* and *Woods II* were also cited in both, but the holdings are consistent with *Lakey*, and do not require separate analysis. *Libera v. City of Port Angeles*, 178 Wn. App. 669, 316 P.3d 1064 (2013); *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 352 P.3d 807 (2015).

property.<sup>6</sup> Thus, *Lahey* is not controlling. Nevertheless, should the Opinion stand, it appears that petitioners are now allowed to bring a claim in superior court even after they receive an adverse administrative ruling. This will strip administrative proceedings of finality, and subject counties to additional litigation.

More broadly, the monetary damages exception is not applicable in the present circumstances. Put simply, the monetary damages exception and the requirement that petitioners exhaust their administrative remedies are separate issues, and the Appellate Court erred when it equated the two. The monetary damages exception allows petitioners to bypass LUPA procedures, standards and deadlines when they raise a claim for monetary damages.<sup>7</sup> Nowhere in RCW 36.70C.030 does it suggest a mechanism for landowners to bypass administrative procedures altogether.<sup>8</sup>

By allowing land owners to jump directly to trial courts for determinations on land use and permitting, the Appellate Court has usurped the decision making authority vested in local officials, and placed it in the hands of the judiciary.

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<sup>6</sup> Additionally, in *Lahey* this Court stated that “Here the homeowners are making a claim they could not make before the hearing examiner.” *Lahey*, 176 Wn.2d at 927. In the present case, Maytown did bring their case before a hearing examiner before abandoning it.

<sup>7</sup> For example, under RCW 36.70C.030 Maytown’s claim would not be barred for failure to comply with LUPA’s 21 day deadline, because Maytown’s claim is partially for monetary damages, thus the exception would apply. However, deadlines and other procedures are different from the failure to exhaust administrative remedies.

<sup>8</sup> Additionally, the monetary damages exception applies to land use decisions, and as the Appellate Court noted, the Amendment Ruling was not a land use decision.

Clearly, shifting traditional executive powers to the judicial branch is not in the interest of Washington counties, nor the state as a whole.

## **2. Thurston County's Actions Did Not Shock The Conscience.**

Unquestionably, local governments have a duty to protect critical areas and the threatened species that inhabit them. RCW 36.70A.070(5)(iv). In the present case, Maytown presented evidence that Thurston County was overzealous in carrying out this duty, but without a doubt, Thurston County's actions were in pursuit of a legitimate government interest, namely ensuring that natural resources were protected. Nevertheless, the Appellate Court ruled that evidence of potential bias was sufficient to find the County behaved in a manner that was shocking to the conscience, and its actions constituted the deprivation of Maytown's due process rights. Such a ruling sets a dangerous precedent under which otherwise legitimate government actions may be unfairly scrutinized for potential bias, and subsequently challenged out as a constitutional violation of due process, all but ensuring that local governments across Washington will be subject to an increasing number of groundless federal challenges, regardless of the claim's validity.

Historically, the "shocking to the conscience" standard has been a high bar to clear, and rightfully so. *County of Sacramento v. Lewis*, 523 U.S. 833, 846-50 (1998). Claiming a violation of due process rights goes beyond a common tort, rather, it is a claim that a government act is so shocking to the conscience as to violate the constitution itself. *Collins v. City of Harker Heights*, 503 U.S. 115, 128

(1992) (“[W]e have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.”). Typically, the official conduct “most likely to rise to the conscience-shocking level,” is the conduct intended to injure in some unjustifiable manner. *Chavez v. Martinez*, 538 U.S. 760, 775 (2003). Past instances where courts have found conduct to be shocking to the conscience includes placing foster children in the homes of sexual offenders and violent offenders, *Braam v. State*, 150 Wn.2d 689, 697, 81 P.3d 851 (2003); pumping a suspects stomach against their will to determine if they had swallowed contraband, *Rochin v. California*, 342 U.S. 165, 166 (1952); and showing deliberate indifference to an inmate’s suicide risk, *Lemire v. Cal. Dep’t of Corr. & Rehab.*, 726 F.3d 1062, 1075 (9th Cir. 2013).

By contrast, here Thurston County was pursuing the legitimate goal of ensuring that critical areas were protected. The failure to safeguard these areas could not only constitute a dereliction of the County’s duty, but it could also open up the County to potential litigation. Moreover, there was no evidence of malice, or specific intent to harm Maytown, and while the permitting requirements may have delayed the gravel mine, the nature of harm allegedly suffered by Maytown, specifically, administrative delays in granting land use permits, is neither an unusual nor extraordinary occurrence in the land use permitting process.

Considering the legitimate government interests behind Thurston County's actions; the lack of evidence of specific intent to harm; and the fact that delays in the permitting process are far from extraordinary, the County's actions do not rise to the level of "shocking" behavior, and lowering the bar to such an extent threatens counties across Washington with due process suits for legitimate acts.

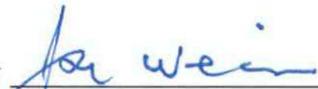
#### V. CONCLUSION

For the foregoing reasons, WSAC respectfully requests that the Court grant Petitioner's Petition for Review.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June, 2017.

WASHINGTON STATE ASSOCIATION OF  
COUNTIES

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